No. 12,486

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN LEONARD McDOWELL,
Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court of the Northern District of California, hereinafter called "the Court below", denying appellant's petition for writ of habeas corpus (Tr. 23), and an appeal from an order of the Court below denying appellant's motion for rehearing. (Tr. 28.) The Court below had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by Title 28 U.S. C.A., Section 2253.

STATEMENT OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus (Tr. 1-10), and the Court below issued an order to show cause. (Tr. 11-12.) Thereafter, the appellee filed a return to the order to show cause (Tr. 13-17), and the appellant filed a traverse to the return to the order to show cause. (Tr. 18-22.) The matter was then submitted, and the Court below filed the following order denying the petition for writ of habeas corpus and discharging the order to show cause:

> "The petition for habeas corpus having been briefed and submitted for ruling and it being noted that the ground relied upon by petitioner was previously presented to this Court in MacDowell v. Swope, No. 28125H.
>
> "IT IS ORDERED, on the authorities previously cited in the above case, that the petition be and the same hereby is DENIED and the order to show cause be and the same hereby is discharged.
>
> "7 September 1949.
>
> GEORGE B. HARRIS,
> United States District Judge."
>
> (Tr. 23.)

Thereafter, and on September 15, 1949, the appellant filed a motion for rehearing (Tr. 24-27), which the Court below likewise denied by the entry of the following order:

"The petition for re-hearing, having been submitted and considered for ruling,

"IT IS ORDERED that the petition be, and the same hereby is, DENIED.

"Dated: September 30, 1949.

GEORGE B. HARRIS,
United States District Judge."

(Tr. 28.)

From these orders appellant now appeals to this Honorable Court. (Tr. 32.)

FACTS OF THE CASE.

On March 16, 1945, appellant was indicted in the District Court for the Southern District of Indiana, in two counts, the first charging forcible entry into a Post Office with intent to commit larceny, 18 U.S.C. 315, and the second charging theft of Post Office property, 18 U.S.C. 313. (Tr. 87-88.) Before trial on this indictment appellant was, on June 7, 1945, convicted of violating the National Motor Vehicle Theft Act and of passing a forged money order, in the District Court for the District of Nebraska, sentenced to imprisonment for three years (Tr. 113-114), and shortly thereafter committed to Alcatraz Penitentiary. (Tr. 134-135.) On November 2, 1945, in compliance with his request for a speedy trial on the Indiana indictment, he was taken to Indianapolis, Indiana, pleaded not guilty, and the case was set for trial on November 29,

1945. (Tr. 96.) On November 23, 1945, he again appeared before the trial Court, with his Court appointed attorney, and asked leave to change his plea of guilty, and the Court permitted the plea to be changed. (Tr. 108.)

There followed a lengthy discussion as to the sentence to be imposed. It appeared that appellant had escaped from a State Prison in Michigan and still had fourteen years to serve on the State sentence. In view of the fact that both counts of the indictment arose out of the same transaction, and since the appellant still had a substantial period to serve on the Nebraska conviction, his counsel asked that he be given concurrent sentences on the two counts. (Tr. 115-120.) The Court then said:

> "I think that five years is all right in this case, and I think that should run consecutively with the term he is now serving." (Tr. 121.)

Considerable discussion ensued as to whether the sentence should also be made to run consecutively to the Michigan State sentence, since it appeared probable that the Michigan authorities had already filed a detainer at Alcatraz, and it was thought that the prison authorities might feel bound to honor that detainer first. (Tr. 121-122.) During the course of the discussion the Court said:

> "You understand what the sentence is, five years to run consecutive with the sentence you are now serving, and also with the Michigan sentence * * * if it is necessary for him to serve that first,

and then would be consecutive. In other words, he would not be serving this five years at the same time he is serving Michigan." (Tr. 124.)

Since appellant's attorney expressed some doubt as to whether the sentence could be made to run after service of a State sentence, the exact form of the judgment entered was not decided upon at that time. (Tr. 124-125, 127.)

Three days later, and on November 26, 1945, appellant and his counsel again appeared before the Court, and the Court said:

"I had the Defendant called back into court in the case in which he was sentenced last Friday, the 23d, for fear there might be a misunderstanding as to the form of the judgment that is to be entered, insofar as the sentence which he is now serving in the Michigan term, the sentence which they are really expected to take him back to serve, and I am going to ask the clerk to read the judgment just as it is, and then see if you have any suggestion or if it is clearly understood. I think the kind of a judgment that we have prepared is just the form. Of course, the sentence was last Friday, and this is the judgment—say nothing about the Michigan case at all, because really he is not serving that now, and we don't know when they will want him to serve it. So just make this cumulative with the sentence which he is now serving." (Tr. 129.)

The Clerk then read the judgment (Tr. 129), and after some discussion the Court asked appellant

whether he understood the judgment the Clerk had read, and the appellant answered that he did. (Tr. 131.)

The judgment as entered made no distinction between the two counts, but imposed a general sentence of five years to begin at the expiration of the sentence appellant was then serving at Alcatraz. (Tr. 90-91.) No mention was made of the Michigan State sentence. No fines were assessed in addition to the prison term.*

On December 23, 1946, appellant filed with the sentencing Court of the Southern District of Indiana a motion to set aside the judgment as void (Tr. 96), on the grounds that sentence had never been orally pronounced by the Court, and that the judgment did not conform to the requirement of 18 U.S.C. 315 that *both* an imprisonment sentence *and* a fine be imposed. After a hearing, the motion was dismissed (Tr. 97-98), and the order was affirmed on January 21, 1948, by the Circuit Court of Appeals for the Seventh Circuit. (Tr. 98, 100-101.) Thereafter, the appellant filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division, Civil No. 28125-H, and in these proceedings urged the contentions which he had unsuccessfully advanced before the sentencing Court in his motion to set aside the judgment. This petition was denied by the entry of the following order:

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*18 *U.S.C.* 313 provides for a fine of not more than $2000.00, or imprisonment for not more than three years, or both. 18 *U.S.C.* 315 provides for a fine of not more than $1000.00 and imprisonment for not more than five years.

"The petition for writ of habeas corpus having been thoroughly briefed and submitted for ruling,

"IT IS ORDERED that the petition be and the same hereby is denied and the order to show cause be and the same hereby is discharged.

"Dated: August 6, 1948.

GEORGE B. HARRIS,
United States District Judge.

"*Bernstein v. United States,* 254 F. 967 (CCA 4), cer. denied, 249 U.S. 604;

"*Brown v. Johnston,* 91 F. 2d 370 (CCA 9), cer. denied, 302 U.S. 728;

"*Jordan v. United States,* 60 F. 2d 4, 5 (CCA 4), cer. denied, 287 U.S. 633;

"*Nancy v. United States,* 16 F. 2d 872 (CCA 9), cer. denied, *sub. nom.*"

(Tr. 143-144.)

In the instant habeas corpus proceedings appellant has abandoned his contention that the judgment was void because the sentencing Court failed to impose a fine in addition to imprisonment for his violation of 18 U.S.C. 315.

QUESTION.

Did the sentencing Court in fact impose a consecutive sentence?

CONTENTION OF APPELLEE.

The answer to the above stated question is: "Yes."

ARGUMENT.

Appellant contends once more that at the proceedings on November 23, 1945, the Court merely indicated that it would eventually impose a five year sentence after it had determined when it should begin to run, and that the Court did not impose sentence on November 26, 1945, because the judgment was read by the Clerk. It is clear, however, that on November 23, 1945, the Court did not merely indicate, but specifically imposed, a sentence of five years to be served in addition to the federal sentence appellant was then serving and in addition to the Michigan State sentence, though leaving the sequence uncertain. There is considerable authority for the proposition that the time when the imprisonment is to begin is not a part of the sentence proper and the sentence is valid even though the time is omitted or indefinitely stated.

Bernstein v. United States, 254 F. 967 (CCA 4), certiorari denied, 249 U.S. 604;

United States ex rel. Brown v. Hill, 74 F. (2d) 822 (CCA 3);

United States v. Wright, 56 F. Supp. 489, 491 (E.D. Ill.);

Fels v. Snook, 30 F. (2d) 187 (N.D. Ga.).

Cf., however,

United States v. Dougherty, 269 U.S. 360;

Brown v. Johnston, 91 F. (2d) 370 (CCA 9), certiorari denied, 302 U.S. 728;

United States v. Patterson, 29 F. 775 (C.C. N.J.).

But even if no valid sentence was imposed on November 23, 1945, there can be no doubt that the proceedings on November 26, 1945, fulfilled all requirements. The sentence is simply the act by which, after conviction, the judge, from the bench and in the presence of the defendant, formally imposes punishment. There is no necessity for a verbatim oral pronouncement. Petitioner here clearly understood what punishment was being imposed and knew that it was the act of the judge. "The Constitution does not require that sentencing should be a game * * *." *Bozza v. United States,* 330 U.S. 160, 166.

In view of the foregoing, it is clear that the Indiana Court imposed a five year sentence to run consecutive to the three year sentence imposed by the Nebraska Court. The appellant, having forfeited 250 days' good time, has not as yet served his terms of imprisonment totaling eight years, which began to run on June 7, 1945 (Tr. 136), and accordingly he is not eligible for release from the custody of the appellee, and the petition for writ of habeas corpus was, therefore, properly denied, as was the petition for rehearing. *Zahn v. Hudspeth,* 102 F. (2d) 759 (CCA 10), cer. denied, 307 U. S. 642.

CONCLUSION.

It is, therefore, respectfully submitted that the decision of the Court below is correct and should be affirmed.

Dated, San Francisco, California,
May 12, 1950.

Respectfully submitted,

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